

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

Re:

**Nordic Printing and Packaging, Inc.,
a/k/a Nordic Press, Inc.,
a/k/a Nordic Packaging, Inc.,
a/k/a Nordic Pak, Inc.,**

Chapter 11

BK 03-36039 DDO

Debtor(s).

**NOTICE OF HEARING AND MOTION BY UNITED STATES TRUSTEE
TO CONVERT OR DISMISS CHAPTER 11 CASE**

TO: The debtor, all creditors and other parties in interest:

A motion to convert or dismiss the above named Chapter 11 case pursuant to 11 U.S.C. § 1112(b) has been filed by the United States Trustee.

The hearing will be held on June 9, 2004, at 1:30 P.M. before the Honorable Dennis D. O'Brien, Courtroom No.228 A, U.S. Bankruptcy Court, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than June 4, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than May 28, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____.

CLERK OF BANKRUPTCY COURT

Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

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**UNITED STATES TRUSTEE'S MOTION
TO CONVERT OR DISMISS CHAPTER 11 CASE**

COMES NOW the United States Trustee through his undersigned attorney, Sarah J. Wencil, and moves the Court to convert or dismiss this Chapter 11 case. In support of his motion, he states the following:

1. The hearing will be held on June 9, 2004, at 1:30 P.M. before the Honorable Dennis D. O'Brien, Courtroom No.228 A, U.S. Bankruptcy Court, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.
2. Any response to this motion must be filed and delivered not later than June 4, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than May 28, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.
3. The United States Trustee has standing to bring this motion pursuant to 11 U.S.C. § 307 and 28 U.S.C. § 586. This matter is a core-proceeding arising under 28 U.S.C. § 157(b)(2)(A). The bankruptcy court has jurisdiction pursuant to 28 U.S.C. § 1334. This motion is brought pursuant to 11 U.S.C. § 1112(b). Local Bankruptcy Rule 1017-2 provides that a motion

to convert may be treated as a motion to dismiss by the Bankruptcy Court if it finds dismissal in the best interest of the creditors and the estate.

4. The debtor filed a petition for Chapter 11 reorganization on September 3, 2003.
5. A Section 341 meeting of creditors was held on October 24, 2003.
6. An Official Committee of Creditors was appointed in the case. Ralph Mitchell, Esq. was employed as counsel for the committee.
7. The debtor's business was the manufacturing of printed material and printed folding cartons.
8. The debtor has ceased operating its business.
9. On approximately March 10, 2004, the Bankruptcy Court approved a Sale of Property of the Estate Free and Clear.
10. The Sale was of substantially all of the debtor's assets.
11. The debtor informally spoke with the undersigned regarding a Chapter 11 Liquidating Plan. The debtor tentatively considered appointing an insider as the liquidating agent. The undersigned stated that the U.S. Trustee would consider such action of the Official Creditors' Committee was in favor of a liquidating Chapter 11 Plan.
12. Counsel for the Official Creditors Committee has informed the U.S. Trustee that the Committee prefers conversion of the case to Chapter 7 and the appointment of a neutral fiduciary over a liquidating Chapter 11 Plan.
13. The debtor has no income to restart or resume the business of the debtor; the debtor has no income to pay post-petition expenses; and the debtor has no income to pay administrative expenses in this case. All such expenses must be paid from existing cash resources.

14. The lack of an income producing business, accruing post-petition liabilities, and the lack of any funds to start a business is cause to convert this case under 11 U.S.C. § 1129(b)(1) - (3).

15. The lack of operating assets is cause to convert or dismiss the case under 11 U.S.C. § 1112(b)(1), (b)(2) and (b)(3).

16. The debtor has failed to submit the March 2004 Operating Report to the Office of the U.S. Trustee. Failure to submit an operating report is cause to convert this case under Section 1112(b).

17. The U.S. Trustee reserves the right to raise any other delinquencies prior to the hearing on this motion, including April 2004 Operating Report, which will be due on or after May 15, 2004; and the First Quarter 2004 Quarterly Fee, which will be delinquent after April 30, 2004.^{1/}

18. The United States Trustee requests conversion over dismissal because a Chapter 7 Trustee can investigate transactions of the business and can bring finality to the case.

WHEREFORE, the United States Trustee requests that the Court convert the above named Chapter 11 case to Chapter 7.

^{1/} The U.S. Trustee will not know the amount due under 28 U.S.C. 1930 for First Quarter 2004 until the March 2004 Operating Report is submitted. The debtor's disbursements for January and February 2004 were \$1,435,759.18, which would put the debtor at the \$5,000 fee level. If the debtor's disbursements for March are over \$564,240.82, it will owe \$7500.

Dated: April 27, 2004

HABBO G. FOKKENA
United States Trustee
Region 12

/s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
Office of U.S. Trustee
Iowa Atty. No. 14014
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5500

VERIFICATION

I, Sarah J. Wencil, Trial Attorney for the United States Trustee for the District of Minnesota, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on April 27, 2004

BY: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
Office of U.S. Trustee
Iowa Atty. No. 14014
U.S. Courthouse Suite 1015
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
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MEMORANDUM OF LAW

Section 1112(b) permits the Bankruptcy Court to dismiss or convert a case for cause. 11 U.S.C. § 1112(b). The Bankruptcy Code does not define “cause”, but subsection (b) provides a non-exhaustive list of ten examples of cause. 7 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, ¶ 1112.04[1] (15th ed. 1997). The portions of 11 U.S.C. § 1112(b) relevant to the present case include the following:

Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee ..., and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including —

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay that is prejudicial to creditors;

11 U.S.C. § 1112(b).

**(1) Continuing loss to or diminution of the estate and
absence of a reasonable likelihood of rehabilitation;**

The requirement under Section 1112(b)(1) is two-fold: (1) there must be a continuing diminution of the estate; and (2) absence of a reasonable likelihood of rehabilitation. 7 COLLIER, ¶ 1112.04[5][a], at 1112-30 & n. 34 (citing *In re Citi-Toledo Partners*, 170 B.R. 602, 606 (Bankr. N.D. Ohio 1994) & 124 Cong. Rec. 32,406 (1978)). The District Court of Minnesota recently ruled that a determination under Section 1112(b) is made by considering the following:

A finding that the debtor suffered continuing losses or maintained a negative cash flow "after the entry of the order for relief" suffices to demonstrate continuing loss to the estate. *Fort Knox*, 2002 WL 1842452, at *2. Absence of likelihood of rehabilitation is satisfied by a showing that the debtor is unable to get the business up and running again on a firm base. *In re Minnesota Alpha Found.*, 122 BR. 89, 93 (Bankr.D.Minn.1990); *Economy Cab*, 44 BR. at 725 n. 2. *113 Under § 1112(b), " 'rehabilitation' contemplates the successful maintenance or re- establishment of the debtor's business operations...." *Minnesota Alpha*, 122 BR. at 93.

Loop Corp. v. U.S. Trustee, 290 BR. 108, 112-13 (D. Minn. 2003); *see also In re Economy Cab & Tool Co., Inc.*, 44 BR. 721, (Bankr. D. Minn. 1984) (citations omitted). The diminution in the estate need not be significant. *In re East Coast Airways, Ltd.*, 146 BR. at 336. "All that need be found is that the estate has suffered some diminution in value. *Id.* (citing *In re Kanterman*, 88 BR. 26, 29 (S.D.N.Y. 1988)).

In this case, the debtor is not operating and has no income to fund the on-going expenses of the estate. As post-petition administrative expenses accrue and are paid out of existing cash, the value of the estate is declining. Permitting the case to continue in Chapter 11 will cause these expenses to accrue and further deplete the estate. The debtor has sold the business and has no income to start-up operations; therefore, there is no current means for the debtor to rehabilitate itself. The debtor has no income or other new source of cash to pay administrative expenses in

this case. Administrative expenses will continue to accrue.

The accrual of post-petition liabilities and administrative expenses will cause a diminution in the value of the debtor. The inability to operate the business will prevent the debtor from rehabilitating itself. These factors constitute cause to convert this case under Section 1129(b)(1).

(2) Inability to Effectuate a Plan

A bankruptcy court may dismiss a Chapter 11 case or convert it to a case under Chapter 7 "for cause, including ... inability to effectuate a plan." 11 U.S.C. § 1112(b)(2). *In re Lumber Exchange Bldg. Ltd. Partnership*, 968 F.2d 647 (8th Cir. 1992) (citing *In re Fossum*, 764 F.2d 520, 521-22 (8th Cir.1985)). With no income or other source of income, the debtor has no ability to meet the criteria of 11 U.S.C. § 1129(a) and confirm a plan of reorganization.

(3) Unreasonable Delay that is Prejudicial to Creditors

Section 1112(b)(3) provides that cause exists when there is "unreasonable delay by the debtor that is prejudicial to creditors." The prejudice must be actual. *In re Economy Cab & Tool Co., Inc.*, 44 B.R. 721, 725 (Bankr. D. Minn. 1984). The debtor does not have a business to operate. Further delay will cause post-petition liabilities and administrative expenses to increase to the prejudice of other creditors.

Monthly Operating Reports

The local rules provide that a debtor "shall comply with all reasonable requirements promulgated by the United States Trustee with respect to filing reports and furnishing information." LOCAL BANKR. R. 107(B) (as amended 1994).

The United States Trustee requirement of a monthly operating report is reasonable because it is sanctioned by the Bankruptcy Rules and the Bankruptcy Code. Federal Bankruptcy Rule 2015

states that a debtor in possession *shall* comply with the following reporting requirements:

- (1) [n/a in this Chapter 11 case];
- (2) keep a record of receipts and the disposition of money and property received;
- (3) file the reports and summaries required by § 704(8) of the Code;
- (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association...;
- (5) [quarterly fees].

FED. R. BANKR. P. 2015. Section 704(8) of the Bankruptcy Code provides:

[I]f the business of the debtor is authorized to be operating, file with the court, with the United States trustee, ... periodic reports and summaries of the operating of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires.”

11 U.S.C. § 704(8).

The debtor-in-possession’s failure to comply with the reporting requirements of the United States Trustee is cause to convert this bankruptcy case. The debtor has failed to submit a monthly operating report for March 2004. The April 2004 report will become due prior to the date of this hearing.

The United States Trustee or other party who requests a copy of said reports cannot determine whether the debtor is complying with its fiduciary duties under the Bankruptcy Code unless complete operating reports are submitted. *See Clarkson v. Cooke Sales and Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (“The [debtor’s] failure to file operating reports or audit reports makes informed expectations about the plan’s success virtually impossible....

[T]he absence of financial data and certain sources of income for the [debtors] indicates the

absence of a reasonable likelihood of rehabilitation.”). The operating reports are necessary to determine the United States Trustee’s fee pursuant to 28 U.S.C. § 1930(a)(6).

Compliance with the United States Trustee’s operating requirements is an indication of the good faith of the debtor, without which the debtor’s plan is not confirmable under 11 U.S.C. § 1129(3) and thus, subject to dismissal under 11 U.S.C. § 1112(b)(2). The Eighth Circuit Bankruptcy Appellate Panel recently held: “ A failure to file monthly operating reports, whether based on inability to do so or otherwise, undermines, the chapter 11 process and constitutes cause for dismissal or conversion of the Chapter 11 proceeding.” *In re Denominational New Church*, 268 BR. 536, 538 (Bankr. 8th Cir. 2001) (citing *First Nat’l Bank v. Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990), wherein the Eighth Circuit affirmed a dismissal of a case for failure to submit operating reports). *See also Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)* 235 F.2d 375 (8th Cir. 2000); *Quarles v. United States Trustee*, 194 BR. 94, 97 (W.D. Va. 1996); *In re Tornheim*, 181 BR. 161, 164 (Bankr. S.D.N.Y. 1995), *appeal dismissed*, 1996 WL 79333 (S.D. N.Y. 1996); *In re Continental Holdings, Inc.*, 170 BR. 919, 929 (Bankr. N.D. Ohio 1994); *In re Great Am. Pyramid Joint Venture*, 144 BR. 780, 790 (Bankr. W.D. Tenn. 1992).

Conclusion

A bankruptcy court has broad discretion in deciding whether to dismiss or convert a Chapter 11 case. *Lumber Exchange Bldg., Ltd. v. Mutual Life Ins. Co. (In re Lumber Exchange Bldg., Ltd.)*, 968 F.2d 647, 648 (8th Cir. 1992). The United States Trustee requests that the Bankruptcy Court convert this case for cause pursuant to 11 U.S.C. § 1112(b).

Dated: April 27, 2004

HABBO G. FOKKENA
United States Trustee
Region 12

/s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
Office of U.S. Trustee
Iowa Atty. No. 14014
1015 United States Courthouse
300 South Fourth Street
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury that she is an employee in the Office of the United States Trustee for the District of Minnesota and is a person of such age and discretion as to be competent to serve papers. That on April 27, 2004, she served a copy of the attached: Notice of Hearing and Motion by United States Trustee to Convert Chapter 11 Case, United States Trustee's Motion to Convert Chapter 11 Case, Verification, Memorandum of Law and proposed Order, by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

William I. Kampf
Henson & Efron
220 South Sixth Street, Suite 1800
Minneapolis, MN 55402-4503

Steve Woitock
CJ Auffey Paper Co.
528 Washington Avenue North
Minneapolis, MN 55401

Bill Ernst
TCF Leasing, Inc.
11100 Wayzata Boulevard
Minnetonka, MN 55305

David J. Aberle
Summit Packaging, Inc.
828 Kasota Avenue SE
Minneapolis, MN 55414

Randy Smith
ECM Converting Company
26920 M-60
Mendon, MI 49072

Robert Messersmith
Graphic Communications International Union
Upper Midwest Local 1M Health and Welfare
Fund
2850 Metro Drive, # 404
Bloomington, MN 55425

Joseph W. McMahan, Jr.
GCIU Local 1-M - Inter Local Pension Fund
684 Transfer Road
St. Paul, MN 55114

Ralph V. Mitchell
Lapp, Libra, Thomson, Stoeber & Pusch
2500 One Financial Plaza
120 South 6th Street
Minneapolis, MN 55402-1826

Internal Revenue Service District Counsel
650 Galtier Plaza
175 East Fifth Street
St. Paul, MN 55101-2905

Internal Revenue Service
Stop 5700
316 N. Robert Street
St. Paul, MN 55101

Bobst Equipment Finance Co.
146 Harrison Avenue
Roseland, NJ 07068

Citizen's Independent Bank
5050 Excelsior Boulevard
St. Louis Park, MN 55416

G.E. Capital
44 Old Ridgebury Road
Danbury, CT 06810-5101

Manchester Commercial Finance
450 Corporate Plaza
7400 Metro Boulevard
Edina, MN 55439

Al Vander Plaats
Alsons, Inc.
113580 Chisholm Circle NE
Blaine, MN 55449

Kurt Holzinger
Preferred Ink Products
3586 Hoffman Road East
White Bear Lake, MN 55110

Nordic Printing and Packaging, Inc.
5017 Boone Avenue
New Hope, MN 55428

Securities and Exchange Comm
Bankruptcy Section
175 W. Jackson Boulevard, Suite 900
Chicago, IL 60604

MN Department of Revenue
Bankruptcy Section
P O Box 64447
St. Paul, MN 55164-0447

United States Attorney
District of Minnesota
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Celtic Leasing Corp.
2601 Business Center Drive, Suite 200
Irvine, CA 92612

Community First Financial
520 Main Avenue
Fargo, ND 58103

Herc-U-Lift
5655 Highway 12 West
P O Box 69
Maple Plain, MN 55359

People's Capital & Leasing Co.
207 - 231 Bank Street
Waterbury, CT 06702-2213

U.S. Bancorp
P O Box 2177
7659 SW Mohawk Street
Tualatin, OR 97062

Matthew R. Burton
Leonard, O'Brien, Wilford, Spencer & Gale
1200 Fifth Street Towers
100 South Fifth Street
Minneapolis, MN 55402

Lisa M. Agrimonti
Briggs and Morgan, PA
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

Stephen Kelly
Rosene, Haugrud & Staab, Chartered
400 Robert Street North, Suite 1800
St. Paul, MN 55101

David A. Orenstein
Parsinen Kaplan Rosberg & Gotlieb, PA
100 South Fifth Street, Suite 1100
Minneapolis, MN 55402

Paul W. Iversen
Williams & Iversen, PA
1611 West County Road B, Suite 208
St. Paul, MN 55113

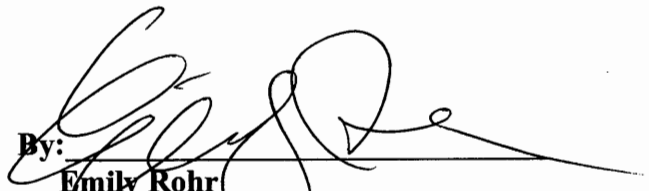
Peter B. Stein
Stein, Moore & Fay, PA
1010 Minnesota Building
46 East Fourth Street
St. Paul, MN 55101

Gregory J. Reigel
Reigel & Associates, Ltd.
921 Main Street
Hopkins, MN 55343

Amy J. Swedberg
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Bankruptcy Administration
IOS Capital, LLC
1738 Bass Road
P O Box 13708
Macon, GA 31208-3708

Phillip Bohl
Gray, Plant, Mooty, Mooty & Bennett, PA
500 IDS Center
80 South 8th Street
Minneapolis, MN 55402

By: 
Emily Rohr
Office of the United States Trustee

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Debtor(s).

ORDER

At St. Paul, Minnesota this _____ day of _____, 2004, the United States Trustee's Motion to Dismiss or Convert the above named Chapter 11 case to Chapter 7 came before the Bankruptcy Court. Appearances were as noted in the record.

Based on the pleadings, findings of fact, conclusions of law, and arguments of parties on the record:

IT IS HEREBY ORDERED that the United States Trustee's Motion to Convert is granted pursuant to 11 U.S.C. § 1112(b). This Chapter 11 case is converted to a Chapter 7 case.

**The Honorable Dennis D. O'Brien
United States Bankruptcy Court**